No. 93-2036 (4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF WEST VIRGINIA, ex rel., CSR LIMITED,
Petitioner,

—v.—

THE HONORABLE A. ANDREW MACQUEEN, III, Judge of the Circuit Court of Kanawha County, CLIFFORD BOSTIC, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR THE PETITIONER

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Respondents acknowledge the disarray in the lower federal courts and the state courts of last resort caused by the differing approaches of Justice Brennan and Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).[1] In opposing CSR's petition, they seek rather to deny that the court below took a dispositive stand on the issue between the two approaches in this Court. But the Supreme Court of Appeals of West Virginia could not have been clearer on this score. It rested its decision squarely on Justice Brennan's proposed rule in *Asahi*:

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[1] The statement required by S. Ct. Rule 29.1 appears at Pet. ii.

> This Court, however, is satisfied that CSR introduced a product into the stream of American commerce that it knew would be used in West Virginia. "Personal jurisdiction 'premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause' and can be exercised without the need to show additional conduct by the defendant aimed at the forum state." *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117, 107 S. Ct. 1026, 1034, 94 L.Ed.2d 92 (1987); Syllabus Point 2, *Hill by Hill v. Showa Denko, K.K.*, 188 W. Va. 654, 425 S.E.2d 609 (1992).

Pet. App. A at 4a-5a. If there could be any doubt on the matter, the syllabus prepared by the West Virginia Supreme Court of Appeals, which by West Virginia law is a part of its disposition, *see* Pet. at 6 n.4, makes clear that this is what that court considered to be its holding. *See* Pet. App. A at 2a.

The West Virginia Circuit Court also was crystal clear that it was basing its decision directly on the proposition that " 'personal jurisdiction can be exercised without the need to show additional conduct by the defendant named in the forum state.' " Pet. App. B at 15a. The Circuit Court found no facts regarding any such "additional conduct," and if the state Supreme Court adverted to any, given its holding and its syllabus, these must be taken to add nothing but atmosphere. That the concurring judge below would have remanded for further fact-finding, Br. in Opp. at 7, simply underscores that the *majority* considered any facts beyond the introduction of a product in the steam of commerce as unnecessary to its conclusion that there was personal jurisdiction here.

Thus, this case squarely presents the question that divided the Court in *Asahi*, whether mere placement of a product in "the stream of commerce" subjects the seller to personal jurisdiction wherever the product ultimately winds up. It poses this question in a context—the sale of a raw material by an

alien to a United States manufacturer who combines it with other ingredients to make a finished product, which the manufacturer then distributes in this country through its own marketing channels—that squarely implicates the "fair play and substantial justice" requirement of personal jurisdiction analysis. The West Virginia Supreme Court of Appeals decided the stream of commerce question as a matter of law, treating the particular facts of any contacts of petitioner CSR with West Virginia as essentially irrelevant, and ruled that the "fair play and substantial justice" requirement is satisfied whenever a large enough number of local plaintiffs sue a foreign defendant that is also being sued in other states.

Respondents seek to avoid coming to grips with the sweeping nature of the West Virginia court's decision by characterizing it as at once "preliminary" and fact-specific. A fair reading of the lower court's opinion shows that it is neither.

1. Contrary to respondent's contention, the West Virginia Supreme Court's decision on jurisdiction is as final as the jurisdictional decisions that gave rise to this Court's opinions in *Asahi*, *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In *Asahi*, petitioner's motion to quash the service of summons and complaint had been denied by the trial court, and a writ of mandate to the trial court that the service be quashed was granted by the California intermediate appellate court and reversed by the Supreme Court of California. 480 U.S. at 105-08. In *World-Wide Volkswagen*, the case came to this Court on denial of a writ of prohibition to restrain the Oklahoma trial court from exercising jurisdiction over the petitioner. 444 U.S. at 288-90. Thus, the two leading recent cases on the subject of personal jurisdiction came to this Court in precisely the same posture as the instant case. In both the previous cases, as in the instant case, the denial of the relief petitioners sought would have subjected them to trial under circumstances where they denied the state court possessed personal jurisdiction to do so. Nor is there any

reason to believe that in those cases petitioners might not have renewed the claim of lack of personal jurisdiction on the basis of different facts or circumstances despite the initial denial of their jurisdictional objections, just as any litigant can seek to reargue an issue on this basis. *See, e.g.*, Cal. Civ. Proc. Code § 1008 (West Supp. 1994) (subsequent motion can be made on "new or different facts, circumstances, or law").[2] Yet this possibility did not defeat their right to seek relief in this Court, and it should not do so now.

In any event, this theoretical possibility is of no more practical significance in this case than it was in *Asahi* and *World-Wide Volkswagen*. Given the "outer envelope" holding of the court below, that court's determination of personal jurisdiction over CSR is definitive, no matter what facts are developed in the course of a trial. This was the same situation in *Asahi* and *World-Wide Volkswagen*, where the state supreme court's rule of law as to personal jurisdiction was so sweeping as to leave no further factual issues to be resolved in the state courts.

Respondents are also wrong in suggesting that the decision of the West Virginia court was made after anything other than a full blown evidentiary hearing on the jurisdictional issue, or that it rests on some kind of tentative "*prima facie*" standard.

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[2] Respondents' suggestion that the state court decisions in *Asahi* and *World-Wide Volkswagen* were somehow more "final" than the state court decision in the instant case because they involved "special appearances," in which "the federal issue *apparently* is finally resolved by the proceedings on the special appearance," Br. in Opp. at 8, n.8, (emphasis supplied) is meritless. Respondents cite no authority for this proposition of California and Oklahoma law, we are aware of none, and the petitions for certiorari and briefs on the merits in *Asahi* and *World-Wide Volkswagen* contain no such statement. Likewise meritless is the attempt to distinguish *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *Rush v. Savchuk*, 444 U.S. 320 (1980), as involving objections to *quasi-in-rem* jurisdiction rather than *in personam* jurisdiction, *id.*, since the exercise of both types of state court jurisdiction is governed by the same constitutional standard. *Shaffer*, 433 U.S. at 212.

Br. in Opp. at 5-7. The hearing on CSR's motion was held after the motion had been previously adjourned by the trial court to permit the respondents to conduct discovery so that the court could adjudicate it finally.[3] Both sides offered affidavits and documentary evidence and presented their legal arguments.[4] The fact that there was no live testimony did not make it any the less a full hearing on the jurisdictional issue, any more than a bench trial conducted solely on the basis of written submissions is any less a trial on the issues presented. There is not the slightest suggestion in the opinions of the trial court or the West Virginia Supreme Court that they reviewed the parties' evidentiary showings on the basis of a *prima facie* standard—a "standard" that appears nowhere in either opinion—so as to render the state supreme court's ruling less than final on the constitutional question raised.

2. Respondents' effort to ground the West Virginia court's jurisdictional decision on findings of disputed fact that it never made, Br. in Opp. 9-12, is radically at odds with the rationale and content of the opinions below. The trial court made no findings beyond the undisputed fact that CSR put a product into the stream of commerce by its sales of fiber to Manville. Pet. App. B at 14a-15a; Pet App. C at 17a. The state supreme court likewise rested its conclusion solely on the placement of fiber by CSR into the stream of commerce by sales to Manville routed to plants outside West Virginia. Pet. App. A at 4a-5a. The essence of the West Virginia court's "outer edge of the due process envelope" theory of jurisdiction, *id.* at 2a, was to avoid any consideration of specific affil-

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[3] CSR's motion to dismiss was first heard by the trial court on May 11, 1993. After ordering discovery, the trial court scheduled a further hearing on November 15, 1993 to hear the parties' evidence and decide the jurisdiction issue. Trial on the merits was scheduled to begin on January 10, 1994.

[4] The affidavits proffered by respondents did not contain any suggestion they were exposed to asbestos sold by CSR, contrary to respondents' statements in their Brief in Opposition here.

iating facts showing forum-oriented conduct by CSR, and rest the exercise of jurisdiction on *a priori* notions of foreseeability stemming from CSR's sale of "substantial quantities" of a product to a major United States manufacturer. *Id.* at 4a.[5] This is the constitutional ruling that merits this Court's review, and as respondents obliquely admit, it is one that deserves a definitive resolution more than seven years after *Asahi* first "splintered" the Court, Br. in Opp. at 10, and continues to divide the lower courts throughout the Nation.

Finally, respondents' lengthy argument that CSR's alleged West Virginia contacts would satisfy any of the three approaches to jurisdiction canvassed in *Asahi* is more appropriate for a brief on the merits than an opposition to certiorari. If there is any doubt on the part of the Court as to the facts regarding these contacts, the remedy would be the traditional one of a remand for further proceedings after the correct jurisdictional standard was announced.

3. Respondents' answer to the "fair play and substantial justice" issue is again to present a justification on the facts for the West Virginia court's decision that the West Virginia court saw no need even to address, and on which it certainly made no findings of any kind. On the contrary, the court below could not have been more explicit, that no facts beyond CSR's placement of its goods in the stream of commerce were

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[5] The West Virginia courts may have recognized that the "evidentiary" basis for most of the purported facts referred to by respondents in their opposition to CSR's petition was questionable at best, if not nonexistent. Most of the "Attachments" referred to by respondents in their Brief in Opposition—which do not appear to have been filed with this Court—were submitted to the trial court without authentication, foundation or explanation, and virtually none of them would be admissible in evidence in the form in which they were proffered. For example, the assertion that "Manville entered into a contract with CSR under which Manville for a time became CSR's exclusive agent for the sale of Australian blue asbestos fiber in the United States," Br. in Opp. at 2, which is absolutely untrue, is based on an excerpt from an undated magazine article by an unknown author.

necessary to its conclusion that West Virginia could exercise personal jurisdiction as a matter of due process. *See supra* pp. 1-2.

It is therefore hardly surprising that there is no indication in the lower court's opinion that the registration to do business in West Virginia of an indirect CSR subsidiary (one that had nothing to do with asbestos) more than two decades after CSR stopped selling asbestos to Manville, Br. in Opp. at 14, played any part in the West Virginia court's treatment of this aspect of the *Asahi* Court's analysis. Indeed, neither court below made any mention of this fact. There was no issue raised below (nor could there have been) of general jurisdiction over CSR in West Virginia on account of any activity of this subsidiary—unrelated as it would be to any aspect of respondents' claims—under the standard of *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). Whether the existence of this corporation or any other unrelated business of CSR in the United States outside West Virginia should bear on the "fair play and substantial justice" of West Virginia's asserting specific jurisdiction over CSR for the events of thirty years ago would involve the merits of the jurisdictional issue (although it played no part in the West Virginia court's resolution of that issue). It has no bearing on the appropriateness of this Court's granting review.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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